IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

MERRILL & RING, L.P. ("Merrill & Ring")

Investor

AND

GOVERNMENT OF CANADA ("Canada")

Party

INVESTOR'S SUBMISSION ON PLACE OF ARBITRATION

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I. OVERVIEW

1. The disputing parties are unable to agree on the place of arbitration. Canada seeks to have the place of arbitration set in Canada in either the cities of Ottawa or Vancouver. The Investor wants the place of arbitration set as Washington, D.C..

2. Washington, D.C. is a neutral location to hold this arbitration. Washington, D.C.'s courts are supportive of international investment arbitration. It is the seat of the World Bank and is designated as the default place of arbitration for arbitrations held under the ICSID Arbitration Rules. Washington, D.C. is a neutral location that is not within the territory of the respondent state to this arbitration.

3. While Canada has adopted the UNCITRAL Model Law, Canada argues that its courts have broad powers to review Chapter 11 awards. As a result, this Tribunal should not select a place of arbitration in Canada when a more neutral venue is available.

II. THE TRIBUNAL CHOOSES THE PLACE OF ARBITRATION

4. NAFTA Article 1130 and Article 16 of the UNCITRAL Rules provide that the Tribunal has the power to choose the place of arbitration. NAFTA Article 1130 provides that the place of arbitration must be "in the territory of a [NAFTA] Party" and is determined by the applicable arbitration rules. This NAFTA Article states:

> Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:
>
> (a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or
>
> (b) the UNCITRAL Arbitration Rules if the arbitration is under those rules.

5. The UNCITRAL Arbitration Rules govern this arbitration. Article 16(1) of those Rules provides that, where the parties have been unable to agree, the Tribunal shall determine the place of arbitration "having regard to the circumstances of the arbitration."

6. The parties to this arbitration disagree on the place of arbitration. In its letter of September 10, 2007, Canada proposed Vancouver or Ottawa. The Investor rejected these suggested locales in its letter of September 19, 2007 and instead proposed the default location of Washington, D.C..

III. WASHINGTON, D.C. IS THE APPROPRIATE PLACE FOR THE ARBITRATION

A. Washington, D.C. Preserves the Equality of the Parties

7. NAFTA Article 1115 and Article 15 of the UNCITRAL Arbitration Rules reinforce that the choice of the place of arbitration must not compromise the equality between the parties. NAFTA Article 1115 provides that the dispute settlement section of the NAFTA, under which this claim is brought, "establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal." Article 15(1) of the UNCITRAL Arbitration Rules provides:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality ...

8. The *Pope & Talbot* Tribunal drew from Article 15 to acknowledge that "[i]n the specific context of a NAFTA arbitration ... it is an overriding principle (Article 15) that the parties be treated with equality."[1] The *UPS* NAFTA Tribunal relied on the principle of equality in choosing Washington, D.C. over Canadian locations for the place of the NAFTA arbitration. The Tribunal said:

> It is ... relevant that it is Canada's measures that are in issue, even if it has been the place of arbitration in all [previous] chapter 11 investment disputes in which it has been the respondent. It is also relevant that Washington D.C. can be seen as having the neutrality of being the seat of the World Bank and the ICSID, rather than the seat of the federal government in the United States of America.[2]

The *UPS* Tribunal, therefore, chose Washington, D.C. because it was the neutral seat of the World Bank, the ICSID and it was not the capital of the party whose measure was at issue.

9. The *Ethyl* NAFTA Tribunal also relied on the principle of equality in acknowledging Washington, D.C. as a suitable place for a NAFTA Chapter 11 arbitration:

> ... NAFTA's Chapter 11 clearly contemplates the possibility of disputes under it against any NAFTA Party being arbitrated in Washington, D.C., since Article 1120 allows a disputing investor to choose arbitration ... under the ICSID convention, Article 62 of which provides that in the

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[1] *Pope & Talbot* v. *Canada*, Decision on Cabinet Confidence, September 6, 2000, Tab 7 at para. 1.5.

[2] *UPS v. Government of Canada*, Decision of the Tribunal on the Place of Arbitration, 2001 *WL* 34804266 (November 17, 2001), Tab 8 at para. 18.

absence of agreement of the arbitrating parties "arbitration proceedings shall be held at the seat of the Centre" i.e., Washington D.C..[3]

The *Ethyl* Tribunal, therefore, acknowledged that the NAFTA contemplates Washington, D.C. as a place of arbitration for Chapter 11 disputes.

10. The Investor submits that a neutral location would exclude holding the arbitration in the state of Washington (home of the Investor) or in the provinces of British Columbia or Ontario (homes of the British Columbia and Canadian governments whose actions in combination are at issue within this claim).

B. The NAFTA Confirms that Ottawa is not the Required Place for the Arbitration

11. Rule 22 of the Model Rules of Procedure for NAFTA Chapter 20 arbitrations provides that the place of arbitration in state-to-state NAFTA arbitration is the capital of the respondent state.[4]

12. Clearly, the drafters of the NAFTA did not intend to require NAFTA Chapter 11 arbitrations to be held in the capital city of the respondent state. Had they so intended a clause similar to Rule 22 would have applied to NAFTA Chapter 11. The *Ethyl* Tribunal considered this point and noted that, by not including a similar rule in NAFTA Chapter 11, the NAFTA drafters confirmed that the capital of the respondent state is an inappropriate place for Chapter 11 arbitrations.[5] The *Ethyl* Tribunal went on to refuse to designate Ottawa as the place of arbitration because it was the respondent state's capital city.[6]

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[3] *Ethyl Corporation v. Government of Canada*, Regarding Place of Arbitration, 1997 WL 33810553 (November 28, 1997), Tab 9 at 4-5.

[4] *Model Rule of Procedure for Chapter Twenty of the North America Free Trade Agreement*, Tab 10.

[5] *Ethyl Corporation v. Government of Canada*, Regarding Place of Arbitration, 1997 *WL* 33810553 (November 28, 1997) Tab 9 at 4: "The fact that the respondent State's capital has been expressly designated by rule adopted pursuant to Chapter 20 would suggest ... that the omission to do so in connection with Chapter 11 was, if anything, deliberate."

[6] *Ethyl Corporation v. Government of Canada*, Regarding place of arbitration, 1997 *WL* 33810553 (November 28, 1997), Tab 9 at 10: "The Tribunal has some reluctance ... to choose Ottawa. This is due to the fact that it is the capital of Canada."

C. The UNCITRAL *Notes on Organizing Arbitral Proceedings* Confirm that Washington, D.C. is the Appropriate Place of the Arbitration

13. The UNCITRAL has supplemented its Arbitration Rules with *Notes on Organizing Arbitral Proceedings*. The Notes do not bind the Tribunal, but they are helpful.[7] Previous NAFTA Tribunals have supported the application of the Notes to determine the place of arbitration.[8]

14. The UNCITRAL Notes recognize that "[v]arious factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case." The Notes go on to identify the following five "more prominent factors":

    (a) "suitability of the law on arbitral procedure of the place of arbitration;"

    (b) "whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced;"

    (c) "convenience of the parties and the arbitrators, including the travel distances;"

    (d) "availability and cost of support services needed;" and

    (e) "location of the subject-matter in dispute and proximity of evidence."

    These factors confirm that Washington, D.C. is the appropriate place of arbitration.

15. Paragraphs (b) and (e) are irrelevant to this arbitration. Both the United States and Canada are parties to the *New York Convention*. The subject matter in dispute does not favour either country. In any event, if a site visit to remote areas of British Columbia is necessary, this could be accomplished by the Tribunal without designating the place of the arbitration in such a remote location.

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[7] United Nations Commission on International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings*, Tab 11. Paragraph 2 of the Notes state that: " [n]o legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them"

[8] See, for example, *Ethyl Corporation v. Government of Canada*, Regarding Place of Arbitration, 1997 *WL* 33810553 (November 28, 1997), Tab 9, at 3; *UPS v. Government of Canada*, Decision of the Tribunal on the place of arbitration, 2001 *WL* 34804266 (November 17, 2001), Tab 8 at para. 6.

Convenience of the Parties and Arbitrators

16. The "convenience of the parties" supports the selection of Washington, D.C.. The Investor is a US based company with its head office in Port Angeles, Washington. There are daily direct flights from Seattle to Washington, D.C.. The Investor is represented by counsel with offices in Washington, D.C..

17. Washington, D.C. is a location convenient for Canada. There are many daily direct flights between Ottawa and Washington, D.C. and Canada has a large embassy in Washington, D.C..

18. The convenience of the arbitrators also favours Washington, D.C.. Mr. Rowley and Professor Dam have access to multiple daily flights to Washington, D.C.. Professor Orrego Vicuña can take direct flights to Washington, D.C. from Chile. There are no direct flights from Santiago to Vancouver or Ottawa.

Availability and Cost of Support Services

19. Given that the ICSID is administering the arbitration, the "availability and cost of support services needed" strongly supports Washington, D.C. as the venue. Holding hearings at the World Bank and being able to rely on its administrative services in Washington D.C. avoids additional cost now that the ICSID is administering this arbitration. This is a significant factor favouring Washington, D.C..

20. The *UPS* Tribunal also relied on the fact that the ICSID was administering the arbitration to choose Washington, D.C. as the place of arbitration.[9]

21. In addition, if the arbitration was held in Canada, it would be necessary for the arbitrators to file and remit Canada's Goods and Services Tax upon their services. This would increase the burden for the non-Canadian arbitrators and increase the cost of the arbitration.

Suitability of the Law on Arbitral Procedure

22. The "suitability of the law on arbitral procedure of the place of arbitration" strongly favours making the place of the arbitration outside Canada.

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[9] *United Parcel Service v. Canada*, Decision on Place of Arbitration, October 17, 2001, Tab 8 at para. 16.

23. Canada has repeatedly argued before its local courts that those courts have broad powers of review over NAFTA arbitration tribunal decisions. In the judicial review of the *Metalclad* NAFTA Chapter 11 decision, Canada argued that awards of NAFTA Chapter 11 tribunals "are not supposed to be worthy of judicial deference and not supposed to be protected by a high standard of review."[10] Canada went on to argue that Canadian authorities supporting deference to arbitral tribunals should not be applied to NAFTA Chapter 11 tribunals,[11] before concluding:

> Given the characteristics of NAFTA Chapter Eleven dispute settlement, and applying the pragmatic and functional approach, it is clear that in interpreting NAFTA, Chapter Eleven tribunals should not attract extensive judicial deference and should not be protected by a high standard of judicial review.[12]

24. Any judicial review of an award issued in Washington, D.C. would be subject to the *Federal Arbitration Act,* which is supportive of international arbitration.[13] US courts have been deferential to arbitral awards. In *First Options of Chicago, Inc. v. Kaplan*, for example, the US Supreme Court said:

> ...where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances...that is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.[14]

The US has never taken the position before its courts that NAFTA Chapter 11 awards are subject to a different standard review than other arbitral awards.

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[10] *United Mexican States v. Metalclad Corporation*, Outline of Argument of Intervenor Attorney General of Canada, 16 February 2001, Tab 12 at para. 25.

[11] *United Mexican States v. Metalclad Corporation*, Outline of Argument of Intervenor Attorney General of Canada, 16 February 2001, Tab 12 at para. 25.

[12] *United Mexican States v. Metalclad Corporation*, Outline of Argument of Intervenor Attorney General of Canada, 16 February 2001, Tab 12 at para. 30.

[13] *United States Federal Arbitration Act*, 9 U.S.C. § 1-16 (1994), Tab 13.

[14] *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995), Tab 14; see also the US Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* 473 U.S. 614 (1985), Tab 15, that also was very supportive for arbitration.

25. The *UPS* NAFTA Tribunal relied on Canada's actions before its courts in finding that Washington, D.C. was a more appropriate place of arbitration than any city in Canada.[15]

26. After reviewing the *UPS* decision on the place of arbitration, the *Pope & Talbot* Tribunal similarly concluded that it was "troubled by the Canadian submissions on reviewability and could have reached the same result on weighing Canada's suitability were these proceedings just starting."[16] Ultimately, the *Pope & Talbot* Tribunal noted that the parties had previously agreed to hold the arbitration in Montreal and that in light of the fact that the motion to change the place of arbitration occurred more than mid-way during the arbitration "too much of this case has been completed to permit an efficient or effective change of place of arbitration at this juncture."[17]

27. The Investor concludes that the place of arbitration should be Washington, D.C. as it alone amongst the venues proposed by the disputing parties provides a neutral and convenient location for the hearing of this dispute.

IV. RELIEF SOUGHT

28. The Investor seeks to have the place of arbitration set as the City of Washington in the District of Columbia.

All of which is respectfully submitted.

Submitted this 9th[th] day of November, 2007.

Barry Appleton
for Appleton & Associates International Lawyers
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[15] *UPS v. Government of Canada*, Decision of the Tribunal on the Place of Arbitration, 2001 *WL* 34804266 (October 17, 2001), Tab 8 at paras. 11 and 16.

[16] *Pope & Talbot v Canada*, Ruling Concerning the Investor's Motion to Change the Place of Arbitration, March 14, 2002, Tab 16 at para. 20.

[17] *Pope & Talbot v Canada*, Ruling Concerning the Investor's Motion to Change the Place of Arbitration, March 14, 2002, Tab 16 at para. 21.